DEFENDING UNPOPULAR CLIENTS IN HIGH-PROFILE CASES

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Jessa Nicholson was the primary defense attorney for Chad Chritton, the Madison man who was accused of locking his teenage daughter in the basement and starving her. Here, Nicholson imparts lessons learned about media coverage, jury selection, and defense strategies while defending an unpopular client in a very high-profile criminal trial.

Managing a very public trial in which you defended a (mostly) unpopular client must have been difficult. Can you speak to that?

The first trial of Chad Chritton lasted almost three weeks, was highly publicized, and resulted in a hung jury on many of the counts. The media coverage of the case from the beginning focused on the most sensational allegations made. If people believed those allegations were accurate, that belief would cause virtually anyone to think terrible things about my client, and I think most people rely on what is reported as accurate. So I was walking into the trial tasked with asking people to completely ignore that very natural tendency. That's hard.

It made jury selection particularly important, because I was going to have to tackle the bias directly with my questions without restating the information that caused the potential bias in the first place, which is tricky. Framing questions was a delicate process, because I didn't want to elicit answers during the open portions of voir dire that would further taint the jury pool. Even if jurors asserted that they could set aside what they had read and only listen to what they heard in court, I worried that they'd remember something they'd seen or heard that would unconsciously slant their evaluation of the evidence.

Further, for a number of reasons, there is very little opportunity for attorneys to engage in dialogue with the press to contextualize, correct, or expand on what's being reported. I find that very frustrating.

You have advised new lawyers to 'ignore the media coverage about you, if and when you have some, but don't ignore what they say about your client – the press can be informative about the thoughts of potential jurors.' Can you explain that? How did that media coverage affect your strategy?

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While I believe that any trial lawyer has to be aware of the impression he or she gives to jurors, I think it's distracting to preoccupy myself with thoughts about whether I was misquoted or looked tired. Trials aren't about the lawyers, they are about the evidence, and whether the evidence warrants a verdict of guilty or not. That's where the focus should stay. That said, which facts make the news each night, and how the media approaches those facts, matters to me, because it provides me with insight about what outside observers are taking away from the testimony.

I don't alter my presentation dramatically as a result of press coverage, but it can provide the opportunity to tweak things. If I felt a piece of evidence had been highlighted during that day's testimony, but the news is silent, I may consider revisiting the point more thoroughly than I otherwise would have. For example, if a client testifies and the press describes him or her as 'angry' on the stand, I'll think about why the client may have come off that way, and address it in my closing argument.

The comments from the general public are enlightening, as well, because the people who take the time to post comments online tend to hold the most impassioned views of a defendant's guilt or innocence. While extreme, the comments that speak about a defendant's guilt prior to the trial do offer some insight on which 'facts' have stuck in people's minds and thus might be the most difficult for them to set aside if they're chosen for the jury, I wouldn't recommend making strategic decisions based solely on comments, but I find them one source for consideration when I'm writing voir dire questions, an opening statement, or closing arguments.

You've been in practice for eight years. Have you handled other high-profile cases? How did you come to defend Chad Chritton?

Yes. Since I've been practicing, I've handled a few cases that have led to televised and print coverage on a local level, but not to the extent I saw in the Chritton case. Homicides and sexual assaults tend to generate a lot of public interest, as well as any case in which the accused is a prominent member of the community.

While the majority of my clients retain me privately, I remain on a list of attorneys willing to accept court appointments for individuals who cannot afford private counsel. I was asked to take the Chritton case on that basis, and I agreed to do so.

What did you learn from this experience? Is there anything you would have done differently?

This case had a larger volume of materials and discovery documents than any other trial I had handled before, and was also the longest. Because of that, I had to learn how to effectively organize a very large amount of information in a way that was easily accessible on a scale I hadn't previously managed, and I'll take some of those new techniques into trial prep for future cases, for sure.

I've never met a trial lawyer who will tell you he or she tried a case perfectly, and I'm certainly no exception to that. I try to order the transcripts of cross-examinations I do, particularly of expert witnesses, after trials, and mark them up and make adjustments to my style for the future. I worry that jurors can lose interest during lengthy testimony that's heavy on scientific or medical evidence, and I'm always trying to find better ways to give them information in a way that's engaging and understandable.
You've said that being prepared is, in your opinion, the single most helpful thing you can do to boost your own confidence. Is there a point at which you know you're prepared? Is there such a thing as over preparing?

I know I'm prepared when what I'll refer to as 'trial jitters' subside, and I find myself wishing the trial would just start because I am ready to get up there and go to it. When that feeling of 'OK, let's roll' sets in, I can look over my notes and know I have to walk away, because additional time with the file will just be me spinning my wheels. In most cases, prepping a trial takes me significantly longer than the trial itself does. I'd say at least two hours of prep time for every hour of trial time, if not more. I suppose that gets to the question of over-preparation.

Spending a seemingly infinite amount of time with a file can lead to a lot of second-guessing yourself, and that can get dangerous, because I trust my instincts. Re-reading material for the sake of rereading it doesn't make sense; you should have an agenda while you're doing it. If you don't, and the review is simply for the sake of repetition, I'd say you're done prepping.

You maintain a sophisticated website and are a frequent blogger. What other strategies do you use in marketing your practice?

To me, word of mouth will always be the most effective form of advertising. I don't think that most people hire an attorney based solely on Internet searches or the phone book; I believe people ask their friends and colleagues for recommendations and tend to rely on the suggestions they receive. So really, having satisfied clients and being respected enough to earn the trust that leads to a referral among lawyers who don't practice in my particular niche are the ultimate forms of self-promotion. To have those things, I have to do the work, and do the work well.

Where do you see your practice in five, ten years?

I'd like to see the firm continue to grow but stay 'boutique' in size, with a strong reputation in our community. Ideally, we'd have six to ten lawyers, all of whom have exceptional trial-advocacy skills and are known to be willing to put up a fight in the courtroom if the facts of the case call for it. Criminal defense will always be the heart of my practice, but I'd like my office to have the ability to offer civil litigation services to clients in house, especially when it comes to claims of excessive force during an arrest or maltreatment during periods of incarceration. It is extremely important to me that our focus remains on the quality of our work product rather than the number of billable hours we can generate and that we continue to be collaborative as an office. I like the familial feel of the firm now and wouldn't want to see that change with expansion.

What advice would you give law students and new lawyers?

While you're still in law school, try and get as much practical experience as you can. If you want to be a litigator, go watch trials. Clinical programs are extraordinarily helpful in harmonizing the more academic or intellectual aspects of the law with the day-to-day practice. I remember walking into court as a new lawyer and not being sure which table in the courtroom was for the prosecution and which was for the defense. That's the sort of stuff that you don't learn in a classroom, you only learn by doing. Once you start practicing, accept the fact that for your first few years as an attorney, you are constantly
going to feel as though you don't know what you're doing. You feel inexperienced because you are, and the only way to fix that is to do the work and gain the experience.

As to starting your own practice right out of law school, honestly, my best advice is simple — don't do it. A solo practitioner works in a sort of vacuum, without outside critique, and can develop bad habits quickly in that isolation. If you're determined to start a practice, seek advice anywhere and everywhere you can get it. Join professional organizations specific to your practice area. Sign up for mentorship programs. Work hard to develop relationships with experienced attorneys in your field; many lawyers are very generous with their time when it comes to teaching the craft, but you should never take advantage of that kindness or use it as a substitute for doing your own research. Ask for constructive criticism.

Set a work schedule for yourself and stick to it, even if you don't have anything to do at your office in the early days. I see a lot of solo practitioners confuse the flexibility of self-employment with the idea that you only have to work when you want to, and I think that dooms their practices. There's a reason that well-established firms have expectations about the time their attorneys spend on cases and in the office, and the need for regular hours and fast responses to clients doesn't change because you're the boss.

Finally, be nice to the people you come into contact with. Not just the other lawyers, but also the bailiffs, clerks, court reporters, and other staff. View them as your coworkers. We all go to work in the same building, and all of us want things to run smoothly. When I say 'be nice,' don't be fake about it. Treat people with genuine respect and kindness, whether they're a judge, a client, a concerned family member, or opposing counsel's receptionist.

**What path brought you to criminal trials?**

I definitely wasn't a person who grew up knowing I wanted to be a trial lawyer. I was terrified of public speaking until about my third year of law school and much preferred writing to oral advocacy probably even four or five years into practicing. While I was in college, I volunteered and ultimately came to work at a domestic violence shelter. Many of the women who stayed there had contacts with the legal system, whether they had to testify as the complaining witness in a criminal trial, go through the divorce process, or attempt to secure a restraining order to protect themselves from unwanted contacts from their abuser. My role was to provide emotional support, and even though I know that's valuable, I found myself frustrated with my inability to advocate and speak up for them in that role. That's when I started thinking about law school. Once I got there, I fell in love with criminal law.

I think the best criminal lawyers could work on either the prosecution or the defense side of a case (in fact, I'm the only attorney in my office who isn't a former prosecutor), but the defense side suited me. Intellectually, I enjoyed trying to see the gray areas, the doubt, and emotionally, I was drawn to being able to stand up for the rights of the individual and help tell that person's story.
Are there questions that people (other lawyers, media, nosy editors, and so on) do not ask but that you wish they would?

The most common question I'm asked by people who don't work in the criminal justice system is, 'How do you defend people you know are guilty?' In contrast, I'm almost never asked how it feels to defend someone who is innocent. I'd like laypeople to ask if my work has led me to any conclusions about the root causes of criminal behavior; about recidivism rates and prisons and the different and sometimes conflicting objectives that come with the pronouncement of sentences in criminal cases. I'd like to see members of the media ask me if I think they've covered a case in a way that presents the public with the most accurate information rather than the most entertaining or sensationalized version of the facts they can construe, and how I think that might impact our justice system.
THE ETHICS OF CLIENT SELECTION: A MORAL JUSTIFICATION FOR REPRESENTING UNPOPULAR CLIENTS
Tchia (Tia) Shachar*
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I. Introduction

Lawyers fulfill a unique and indispensable role in a democratic society. Albeit the obvious consensus in this matter, lawyers who take on the task of representing unpopular or unorthodox clients and causes are frequently the subject of heated debates and controversies. At one end of the spectrum, are those who vigorously assert that representing the 'man-in-trouble' at his worst time is the highlight of the legal profession, and its source of pride. On the other end, are those who preach for moral accountability and vigorously maintain that there is nothing noble in dedicating one's knowledge, skills and scarce resources for the sake of helping reprehensible people or advancing harmful or immoral goals.

Such debates and controversies usually produce a destructive 'chilling effect' on the availability of counsel. Unpopular or unorthodox clients, which are often already situated at the oppressed and neglected margins of society, are thus prone to experience much

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1 The concept of 'unpopular' or 'unorthodox' client cannot be exhaustively defined, since it is an amorphous amalgam of individual as well as collective cultural values. For the purposes of this essay, this concept will be roughly defined as to include all cases which attract negative public reaction (in contrast to public sympathy or indifference) either due to the client's deeds or ideology. See Charles W. Wolfram, A Lawyer's Duty to Represent Clients, Repugnant and Otherwise, in The Good Lawyer: Lawyers' Roles and Lawyers' Ethics 214, 225-226 (David J. Luban ed., 1983).

3 The cold war period provides us a striking example to that effect. Lawyers who agreed to represent suspected communists were vigorously persecuted by both the general public and the American Bar Association. The subsequent reluctance of most lawyers to represent such clients was, thus, an inevitable result. See: Jerold S. Auerbach, Unequal Justice: Lawyers and Social Change in Modern America 231-262 (1977).

greater difficulties in implementing the constitutional right to representation and finding a lawyer who will agree to represent them.

Notwithstanding the core principle of democracy, which provides that every person has an equal opportunity to competent representation, most lawyers, at some point in their careers, find themselves being forced to publicly justify their decision to represent certain clients. Common examples include the criminal-defense lawyer, who so (too) often confronts the question how can he sleeps[sic] at night after representing notorious criminals – murderers, rapists, child molesters and the like; the civil-case attorney, who often confronts the question how can he look himself in the mirror after zealously representing evil-doers who use the law in order to advance goals which harm society; or the civil-rights attorney, who frequently confronts the question how can he silence his conscience after enlisting to his aid the Constitution or other fundamental norms so as to promote morally wrong causes and ideologies while society is overwhelmed with 'real' and pressing injustices.

From a philosophical point of view, criticism or praise of those lawyers who undertake the task of representing unpopular clients or causes stems from the unique nature of the lawyer-client relationship. At the core of a lawyer's role lies the action of representation. In essence, this means that a lawyer's consent to represent a certain individual supposedly obligates the lawyer to enter the client's shoes, adopt the client's problem as if it was his own; and from that inside and intimate stance, do his best in order to provide an optimal solution for the client, within the boundaries of law and ethics.

Hence, the conception of the lawyer's role differs from the conception of the roles society assigns to all other professionals. For example, a physician neither enters his patient's shoes at any stage of the treatment, nor takes upon himself the patient's illness as if it was his own; and it is from that outside and remote stance that he aspires to implement his medical skills to aid the patient. A lawyer, unlike a physician or other professionals, has a distinct and unique role in a way that only he 'becomes one' with the client, as a direct result of the action of representation. Hence, it is the lawyer – and not the physician or any other professional – who is prone to attract public attention due to decisions regarding the choice of clients.

The unique nature of the lawyer-client relationship raises the question whether the action of representation, which distinguishes the lawyer's role from the roles of all other professionals, necessarily creates an unbreakable correlation between the personal morality of the lawyer, and the moral identity of the individuals or causes he chooses to represent. Presented in another way, the question is whether a good lawyer, who zealously adheres to the ethical standards of professional responsibility regarding representation of unpopular clients or causes, can also be a good person, worthy of respect and approbation. Essentially, at the center of our inquiry stands the age-old

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universal controversy, regarding the nature of the moral clash between the norms of professional morality ('role morality') on the one hand, and the norms of personal and common morality, on the other hand.

This article will present the three prominent moral theories, which aspire to provide a solution to the controversy. Though profound and ingenious theories, I shall argue that they are nonetheless incapable of providing an adequate solution, because they all possess two identical logical impediments. The first impediment results from the theories' aspiration to produce an ultimate analytical explanation, regarding the moral essence of the lawyer as a role agent\(^6\) within the legal system;\(^7\) however, producing such a unified explanation in pluralist-democratic societies is neither possible nor desired, in light of the highly complex nature of the action of representation. Secondly, in a futile effort to decode the ultimate moral essence of lawyering, all theories destroy – either deliberately or inadvertently – the essential analytical dichotomy between the lawyer's professional and private spheres of life;\(^8\) thus, they all eventually rely on such analytical frameworks which de-facto prevent a real possibility to create a clear-cut dichotomy between the lawyer as a professional and the lawyer as a private person.

As I shall argue, due to these interconnected impediments, none of the available moral theories has ever been able to capture the public's heart or gain extensive support within the legal community. This has resulted in a dangerously growing trend to avoid an informed and tolerant debate regarding the moral essence of lawyering, and instead

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\(^6\) The phrase 'role agent' refers to the function assigned to the lawyer within the legal system, by virtue of his professional occupation. See e.g., David Luban, Lawyers and Justice: An Ethical Study 138 (1988). The moral essence of the lawyer as a role agent stands at the heart of this essay, and will be discussed in length hereinafter.

\(^7\) Though it would be noted that each theory is not designed to stand in and of itself, but rather has to be fitted into a larger moral theory of professional conduct. A larger theory would determine the precise relations between the lawyer's professional, private and communal spheres of life. But the focus of the present inquiry is only of theories regarding the essence of the action of representation and the manner they ought to reflect on the larger theory.

\(^8\) It shall be noted that the notion of a dichotomy between the lawyer's professional and private spheres of life may be opposed on grounds of the freedom to choose between prospective clients. Those who oppose the said dichotomy may argue that the freedom given to the lawyer, to pick and choose his clients, inevitably reflects on his private morals and assigns moral responsibility to the societal outcomes of the representation. See, e.g., Freedman, "Must You Be the Devil's Advocate?," supra note 2, at 632; Note, "The New Public Interest Lawyers," 79 Yale L.J. 1069, 1120, 1144 (1970).

As I shall argue in the following chapters, this essay upholds the notion of a dichotomy between the lawyer's professional and private spheres of life. It contends that the choice of clients ought to be perceived as a morally-neutral professional decision which cannot reflect on the lawyer's private morals. The lawyer, as a professional, does not (and cannot) represent the client's deeds or beliefs; he only represents the client's rights and liberties under the law. Hence, the choice of clients may symbolize nothing more than the lawyer's commitment to ensure access to legal services to all the people in need, regardless of the nature of their personality or individual characteristics and causes. See, e.g., Fortas, supra note 2, at 1002; Michael E. Tigar, "Setting the Record Straight on the Defense of John Demjanjuk," Legal Times, (September 6, 1993) in Nathan M. Crystal, Professional Responsibility - Problems of Practice and the Profession 634, 636-637 (1996).
place judgment on lawyers (either favorably or unfavorably) on the basis of haphazard impulses and demagogic assertions.

Against this background, the purpose of this essay is not to offer yet another distinctive theory regarding the moral essence of the lawyer's role, but rather to develop a consensual macro theory; one that acknowledges diversity but nevertheless provides a preliminary neutral, pragmatic and coherent analytical infrastructure upon which each individual can build his own ideological sub-theory in a thoughtful, calculated, and tolerant manner. Since the common denominator of all available theories is the presupposition of the lawyer as an agent whose function is to enhance the client's autonomy, Part III of this essay asserts that the focal point of such a consensual macro theory should be the conception of the lawyer as a mere representative of the client's rights and liberties under the law, rather than of the client as a person – that is, the conception that although the action of representation essentially compels the lawyer to 'become one' with the client, it is in fact not unification with the client as a person, but rather with the client's rights and liberties under the law. Only such publically accepted macro theory, which does not aspire to impose a singular explanation for performing the action of representation, and has an analytical framework that explicitly supports a dichotomy between professional morality and personal and common morality, can provide adequate solution to many of the ethical dilemmas that occupy the profession nowadays; prominent of which is the problem of uninformed criticism and vilification of lawyers who carry out the complex task of representing unpopular clients or causes.

II. Prominent Theories of Legal Ethics Regarding the Essence of the Action of Representation

A. Advocacy in an Adversary System

The philosophical premise of the adversarial theory of representation is both client-centered and process-oriented. The lawyer is perceived as an agent whose function is to keenly maximize the client's autonomy under the law and consequently, guarantee the revelation of legal truth. To the extent the roles of both parties to the conflict – through their lawyers – are not fully played, the court's ability to reveal the truth respectively decreases.

In order to fully play out this role, a lawyer must exhibit a categorical readiness to act on an absolute moral belief that his role mandates keen partisanship and an unconditional commitment to an aggressive and zealous pursuit of the client's objectives, within the boundaries of law and ethics. It is based on this analytical presupposition that the

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10 Id.

11 Id.
The lawyer is exempt from moral responsibility for the societal consequences of his professional activities.12

The adversarial theory of representation promotes the notion of equal and skilled representation across the board and assigns special importance to the representation of those who are unpopular and indigent. It urges lawyers to not lightly seek to decline representation of unpopular clients; and once the lawyer-client relationship has been contracted, to vigorously (but in a legal and ethical manner) pursue the client's objectives with no regard to personal or communal moral values. Despite the adversarial theory's decisive ideological narrative, it ultimately fails to create a moral dichotomy between the lawyer as a professional and the lawyer as a private person. Its practical failure is evident in everyday life, as illustrated when lawyers representing unpopular clients or causes are often subjected to harsh criticism, even by the most ardent adherents to the adversarial model, who perceive the moral distinction between actor and principal as artificial and unreal.13 This perception greatly hinders the de-facto implementation of the notion of equal representation for all. In certain countries which generally adhere to the adversarial theory of representation, such as the State of Israel, the rules of legal ethics simply award lawyers with full normative discretion to choose between prospective clients with no instructional guidance whatsoever as to its proper implementation.14 In contrast, other countries possess more comprehensive codes of conduct, which do take great pains (at least in the narrative aspect) in order to emphasize the special importance of representing unpopular clients and causes as a means of ensuring equal access to legal services. In the United States, for example, the ABA Model Rules of Professional Conduct as well as the ABA Model Code of Professional Responsibility state that while the lawyer is ordinarily at liberty to choose between prospective clients, he is nonetheless expected to exercise thoughtful discretion and not lightly decline proffered employment from unpopular people who are prone to experience significant difficulties in attaining competent representation.15 Similarly, in England the Solicitors Code of Conduct (2007) granted solicitors the liberty to choose clients but nonetheless stated that it is impermissible to decline proffered employment on the grounds that the nature of the case or the conduct and beliefs of the prospective clients are unacceptable to the solicitor or to any section of the public. However, the 2011 revised Code of Conduct has adopted an 'outcomes-focused' approach which stripped out a lot of the detail of the previous Code. The new Code now grants solicitors the liberty to choose their clients with no significant instructional guidance.16 The Barristers' Code of Conduct

12 Id.

13 See, for example, Professor Monroe Freedman's position regarding the moral accountability entailed in the clients selection process: Freedman, "Must You Be the Devil's Advocate?", supra note 2; Monroe H. Freedman, "The Morality of Lawyering," Legal Times (September 20, 1993) in Nathan M. Crystal, Problems of Practice and the Profession 637 (1996). Professor Freedman, as noted, is a strong proponent of the adversarial model. See supra note 9.

14 See Regulations of the Israel Bar Association (Professional Ethics) art. 12 (1986).

15 See Model Rules of Prof'l Conduct R. 1.2 (2012), cmt. 5; and R. 6.2 cmt.1; Model Code of Professional Responsibility EC 2-26- EC 2-29 (1980).

is significantly more extreme in that regard, since it actually imposes obligation on Barristers to represent all comers.\(^\text{17}\)

At the end of the day, the inconsistent implementation of the adversarial theory of representation leads us to the inevitable conclusion that it ultimately fails to create a viable and realistic moral dichotomy between the lawyer as a professional and the lawyer as a private person. This failure stems from an analytical inconsistency, which involves two of the underlying arguments of the theory: the argument in favor of moral nonaccountability\(^\text{18}\) is supposed to somehow co-exist with the argument that lawyers ought to be free to pick and choose their clients as they please, given the intimacy accorded to the action of legal representation. The latter argument, however, stands in direct logical contradiction to the former, and hence undermines the formation of a compelling dichotomy between the lawyer’s professional and private spheres of life.

Discretion to choose between prospective clients – i.e., to choose with whom to enter into an intimate relationship – inherently expresses personal moral choice, which indicates the values of the choosing lawyer, and thus cannot co-exist with the presumption of moral nonaccountability.\(^\text{19}\) A professional who truly perceives himself as an agent, whose function is to maximize client’s autonomy within the adversary system, ought to possess an intrinsic moral obligation to accept every prospective client who is in need for his services, unless objective limitations (time, resources, conflict of interest, etc.) prevent him from doing so.\(^\text{20}\) He may not decline one potential client and accept another merely due to personal preferences, since this creates a de-facto hierarchy


\(^\text{18}\) The principle of ‘moral nonaccountability’ relieves the lawyer from responsibility to the negative outcomes that may ensue from his decision to represent an unpopular client or cause. According to this principle, the public has no valid ground to criticize the lawyer or demand that he attempts to justify his choice of clients or causes. This principle has been eloquently described by Professor Murray Schwartz: see Schwartz, \textit{supra} note 2, at 673-674 (‘The advocate might well reply to the ‘how-can-you-defend-him’ question: I represent him because the system demands that I do so... You may not hold me substantively, professionally, or morally accountable for that behavior... the concept of moral nonaccountability is equivalent to the filing of a demurrer, rather than an answer, to the charge of immorality. In effect, as long as the charge does not allege a violation of the established constraints upon professional behavior, the lawyer is beyond reproach for acting on behalf of the client.’).

\(^\text{19}\) Freedman, \textit{supra} note 2, at 632; Freedman, \textit{supra} note 13, at 638; David Pannick, \textit{Advocates} 136-140 (1992); David Mellinkoff, \textit{The Conscience of a Lawyer} 270-271 (1973).

\(^\text{20}\) When objective limitations exist, the process of client selection ought to be conducted either chronologically (‘first come, first served’ basis) or strategically (accepting only clients whose cases bring about fundamental issues with a wide potential effect). See Pannick, \textit{supra} note 19; Madeleine C. Petrara, "Dangerous Identification: Confusing Lawyers with Their Clients,” 19 J. Legal Prof. 179, 185-190 (1994).
between people whose rights are more or less important to the lawyer; and thus imposes moral accountability.

Indeed, for this reason some common law countries do impose on lawyers a disciplinary duty of representation, known as the 'Cab-Rank Rule.' In England, for example, Barristers are obligated to represent every prospective client in any legal field in which they profess to practice. The duty of representation, however, has a number of broad exceptions which either mandate or allow the Barrister to deny proffered employment for various reasons, such as insufficient time, improper fee, etc. In practice, the 'Cab-Rank Rule' has been proven ineffective due to its broad exceptions, which can be used in an excessive and manipulative manner by Barristers who uphold the lawyer's freedom to choose which clients to represent. This, of course, creates in England a de-facto dilemma of moral accountability, which is similar in its essence to the dilemma which de-jure exists in the United States and Israel.

Both the Model Rules and Model Code also provide a striking example to the above-mentioned analytical failure, when on the one hand they explicitly adopt the conception of moral nonaccountability and encourage lawyers to demonstrate professional responsibility by representing unpopular clients or causes; but also concurrently acknowledge the fact that lawyers may find the client or the cause so repugnant as to be likely to impair their ability to competently represent the client. This normative connection between the professional and private spheres proves once again that even adherence to the adversarial theory of representation cannot realistically result in complete isolation of the intimate action of representation from the private moral spheres of the lawyer.

B. A Lawyer's 'Mind-Set, Heart-Set, Soul-Set'

As one can understand from its name, the philosophical stance of this theory – which was offered by Professor Barbara Allen Babcock – is one of personality. At its core stands the notion that representation of unpopular clients or causes is a task not meant


24 Model Rules of Prof'l Conduct, supra note 15, R. 1.2(b); ABA Model Code of Prof'l Responsibility, supra note 15, EC 7-17.


26 Model Rules of Prof'l Conduct, supra note 15, R. 6.2 cmt. 2 ('For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if... representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship.'); ABA Model Code of Prof'l Responsibility, supra note 15, EC 2-30 ('[a] lawyer should decline employment if the intensity of his personal feeling, as distinguished from a community attitude, may impair his effective representation of a prospective client.').
for everybody. Only a special class of lawyers, with a peculiar 'mind-set, heart-set, soul-set,' is capable of reaching such a high degree of devotion and selflessness, that enables reconciliation of role with self.\textsuperscript{27}

While a lawyer's choice to represent popular or normative clients or causes is not morally questionable, his decision to represent unpopular clients is bound to spur a powerful moral clash between professional norms on the one hand, and individual and societal norms on the other. It is a moral clash that imposes on the lawyer substantial difficulties in both a professional and personal\textsuperscript{28} mode; and thus not everyone is equipped to deal with it. Under this theory, only lawyers whose mind, heart, and soul are unconditionally and selflessly devoted to the ultimate goal of the legal profession – that is, enhancement of client's autonomy – are apt to take on the unrewarding task of representing the reprehensible.\textsuperscript{29}


\textsuperscript{29} Professor Babcock identifies five major reasons that generally motivate lawyers who have been endowed with such a peculiar 'mind-set, heart-set, soul-set': (1) the garbage collector's reason (someone must do the dirty work in order to secure the proper functioning of the legal system); (2) the legalistic or positivist's reason (neither the lawyer or the judge or jury can know the factual truth; they can only know the legal truth, which is best revealed after the roles of the lawyers from both sides have been fully played); (3) the political activist's reason (many evil-doers are themselves victims of grave injustices, and therefore there is poetic justice in awarding them adequate representation once they stand on the other side of the barricade); (4) the social worker's reason (the man-in-trouble, who often belongs to a disadvantaged underclass, perceives the lawyer as a savior who comes to his rescue, and thus displays greater willingness to overcome feelings of anger and alienation towards society); (5) the egotist's reason (although representing the abhorrent people of society does not produce the most good, it nonetheless proves most challenging and provides the most excitement). It would be noted that these reasons are neither exhaustive nor accumulative or alternative in nature. Rather, they are an eclectic array of possible ideological motivations for representing unpopular clients and causes. Each individual may choose the reason or the amalgam of reasons which best describe his ideological perception. \textit{See} Babcock, "Defending the Guilty," \textit{supra} note 27, at 177-79; Babcock, "The Duty to Defend," \textit{supra} note 27, at 1518.
The 'lawyer's personality' theory, like the 'adversarial theory of representation,' is founded on an analytical framework that impedes the possibility of creating moral dichotomy between the lawyer as a professional and the lawyer as a private person. Its underlying assumption, that the choice of clients testifies on the lawyer's personality, utterly destroys the possibility of creating moral detachment between the professional and the personal. Endorsement of the conception of the lawyer-client relationship as one, which involves interaction between the sphere of duty and the private spheres of life, inherently suggests an intense involvement of personal moral values in the professional process of client selection. Thus, instead of reinforcing the desired notion of the choice of clients as a moral-neutral decision, the 'lawyer's personality' theory establishes an opposite notion of client selection as an expression of one's personality. The latter imposes on the lawyer moral and public accountability for his choice of clients, and hence exposes him to public criticism; albeit the fact that the theory's stated goal is to prevent, or at least mitigate, such criticism.

C. The Lawyer as Friend

Over thirty years ago Professor Charles Fried offered a somewhat subversive, but incisive theory, which equated the moral foundations of the lawyer-client relationship to that of friendship. Professor Fried suggested that the lawyer is to be perceived as a professional who, by virtue of the lawyer-client relationship, fulfills the role of the client's friend. Professor Fried further explained that this friendship is a limited-purpose friendship, applicable solely to the legal sphere. His theory rests on the premise that the lawyer, as a 'legal friend,' enters into a personal relation with the client, adopts his interests as if they were his own, and thus expresses an intense identification with the client's goals; similar to that of a natural friend.

Professor Fried openly acknowledged the inherent difficulties of his theory, but strongly maintained that the true moral foundations of the lawyer's role lie in the analogy to natural friendship. Hence follows the conclusion that the lawyer has moral liberty to choose his clients – i.e., his friends – as he pleases, and not according to the utilitarian-communitarian approach, which focuses on where the greatest need for his particular legal talent lies. Similarly, follows the conclusion that within the boundaries of law and

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31 Fried, supra note 30, at 1071-1072.

32 For example, the difficulty of describing as 'friendship' a relationship which has to be bought and which has a known expiration date, the oddness of a friendship whose main characteristic is lack of reciprocity (only the lawyer devotes himself to the client's interests, not the other way around), etc. The specific difficulties of Professor Fried's theory are irrelevant to our discussion, which focuses on the ideological macro-framework, rather than on the particular micro-complexities within it.

33 Fried, supra note 30, at 1078.
ethics, the lawyer is morally entitled (though not always obligated) to further the interests of the client even through means which are not consonant with the public interest.\textsuperscript{34}

At the core of Professor Fried's theory is the assumption that the lawyer's role is designed to enhance client's autonomy.\textsuperscript{35} However, it does so through an analytical framework that not only impedes the possibility of creating moral dichotomy between the lawyer as a professional and the lawyer as a private person, but in fact firmly and explicitly establishes the lawyer-client relationship as one which relies on a personal relation of friendship.\textsuperscript{36} Perceiving the action of representation as a form of friendship indicates the existence of an inherent correlation between the moral choices of the lawyer as a professional and his moral choices as a private person. Specifically, it indicates that the choice of clients parallels the choice of friends, and that the choice of means parallels the manner one chooses to treat his friends. The fact that the lawyer-client friendship is limited in scope to the purview of the legal sphere cannot by itself suffice to create a genuine moral detachment between the professional and the personal since all of Professor Fried's moral-operative conclusions with regard to legal friendship are directly and unequivocally derived from natural friendship.\textsuperscript{37} The 'lawyer as friend' theory firmly reinforces the notion that the lawyer (as a role agent) favors his chosen clients, just like he favors his chosen friends (as a private person). This notion of selective favoring undermines the possibility to establish a viable separation between the lawyer's professional and private spheres of life.\textsuperscript{38} The failure to establish a genuine analytical moral detachment not only thwarts the theory's core-purpose of immunizing the lawyer from public scrutiny due to choices of clients and means; but ironically, exposes the lawyer to such scrutiny even more.

III. The Essence of Representation: Forming a Consensual Macro Conception of the Lawyer's Role in Society

A consensual agreement regarding the exact moral essence of the lawyer's role in a pluralistic-democratic society can, and perhaps should, never be achieved. In the context of client selection, as well as in various contexts throughout the lawyer-client relationship, the action of representation often spurs a triple-layered moral clash,\textsuperscript{39} which ultimately prevents the formation of such a consensus: the first layer – role morality – comprises of the lawyer's responsibility toward the client to provide diligent and zealous representation within the bounds of the law; the second layer – personal morality – comprises of the lawyer's responsibility toward himself, since enhancement of client's

\textsuperscript{34} Id. at 1080-1087.

\textsuperscript{35} Id. at 1077.

\textsuperscript{36} See also Postema, supra note 5, at 81 (indicating the fact that the impersonalism and moral detachment characteristic of the lawyer's role are not found in relations between friends).

\textsuperscript{37} For a similar criticism, see Postema, Id.; Edward A. Dauer & Arthur Allen Leff, "Correspondence –The Lawyer as a Friend," 86 Yale L.J. 573, 576 (1977).

\textsuperscript{38} Id.

\textsuperscript{39} For a general discussion of this clash, see Luban, supra note 4; see also Wasserstrom, supra note 9.
autonomy surely cannot come at the expense of the denial of it to the lawyer; and the third layer – common morality – comprises of the lawyer's responsibility toward society and the court, since many of the decisions in his professional capacity may well affect collective good, as well as the manner society perceives his designated role as an officer of the court.

Within the framework of this triple-layered clash, the organized bar as well as the individual lawyer are often required to provide feasible solutions to hardly solvable moral dilemmas. Additionally, because the canons of professional responsibility usually provide only minimal guidance, the individual lawyer possesses an overwhelmingly broad discretion to deal with the dilemmas. It is not surprising, then, that every legal theory of moral philosophy has aspired to fulfill the normative void by producing the one ultimate analytical explanation of the essence of the lawyer's role.

Though profound and ingenious, none of these theories has ever gained wide public support because they are perceived as portraying the lawyer-client relationship in implausible concepts. Indeed, all theories share an identical common denominator, which ironically is also their common infirmity: an uncompromised aspiration to form an ultimate conception of the moral essence of the lawyer's role. However, reaching a consensus as to the morality of the lawyer as a role agent is neither possible nor desired in multi-cultural societies, in light of the exceptional nature of the action of representation, which puts the lawyer in a unique and intimate stance and essentially compels him to 'become one' with the chosen client.

Lawyering, by its nature, often entails making complex moral decisions. While certain professionals may use the 'lawyer as friend' theory as a guide, others may adhere to the 'lawyer's personality' theory, or the 'adversarial theory of representation,' or any other moral theory for that matter. One way or another, role agents are first and foremost autonomous and minded human beings, and hence every professional decision they make is subjectively and ideologically motivated. Even an informed resolution to deny all principled theories and base every decision on earthy ad hoc considerations of self-interest (money, publicity, reputation, etc.) is an equally ideological-motivated decision (though generally not highly acclaimed).

It is therefore evident that the prevalent aspiration to form a consensual conception of role morality is objectively impractical. Plurality of opinions shall always exist in the field

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40 William H. Simon, "Ethical Discretion in Lawyering," 101 Harv. L. Rev. 1083, 1131-1133 (1988); Nathan M. Crystal, "Developing a Philosophy of Lawyering," 14 Notre Dame J. L. Ethics & Pub. Pol'y 75 (2000). In Israel, the problem of minimal ethical guidance is particularly remarkable, since the rules of professional responsibility are not based on a coherent and organized philosophical infrastructure. Hence, the code of professional ethics either completely disregards certain vital issues or regulates them in a flawed manner. For example, in a sharp contrast to the American and English codes, the Israeli code does not even include comments or rules of instructional guidance, but is only comprised of brief disciplinary rules. As a result, the Israeli lawyer is particularly prone to experience great difficulties when faced with the need to thoughtfully handle with complicated ethical dilemmas.

41 See also Crystal, supra note 40 (arguing that there is no one correct philosophy of lawyering. Therefore, instead of wrongly trying to mandate a choice among different philosophies, the Bar ought to allow lawyers to either adopt an existing philosophy or craft their own methodical philosophy of lawyering).
of legal ethics. How can it not, when accommodation between competing moral values of role, self, and community is so frequently required within the framework of such an intimate relationship?

Nevertheless, the absence of a consensual moral theory of lawyering is not to be construed as leaving the decisions concerning the dilemmas arising from the triple-layered moral clash solely to the realm of haphazard individual discretion. Although the theories vary from one another to a lesser or greater degree, they are all founded on the elementary perception that the function of the lawyer as an agent is to enhance client's autonomy.

Relying on that basic characteristic, each theory attempts to decode the ultimate moral justification (legal friendship, peculiar personality, adversary advocacy, etc.) for performing that exceptional function. However, as noted above, by doing so it inevitably destroys – either deliberately or inadvertently – the analytical dichotomy between the lawyer’s professional and private spheres of life, and thus critically impairs its ability to provide publically acceptable solutions to the many ethical dilemmas encountered by the lawyer.

The consensus around the fundamental perception that the lawyer is an agent who enhances the client's autonomy should therefore be the focal point of a macro theory of lawyering. This would shift the focus from debating the merits of various sub-theories whose goal is to promote particular justifications for performing the action of legal representation, to the action of representation itself.

Under such a macro theory, it would be well established that enhancement of client's autonomy means that the lawyer is, in effect, an extension of the legal personality of the client. Additionally, though the action of representation essentially compels the lawyer to 'become one' with the client, it is not unification with the client as a person, but rather with the client's rights and liberties under the law. Hence, for example, a lawyer's choice to represent the unpopular 'citizen x,' who is accused of a heinous murder, expresses endorsement of x's rights and liberties (x's legal personality), but not of x as a person (x's moral personality). So is the lawyer's decision to represent the well-liked 'citizen y,' who has fallen victim to an outrageous injustice; or any other individual-in-need for that matter.

The lawyer's decision to represent a certain client would always be perceived as a decision which is based on his capacity as a legal practitioner, and hence the endorsement entailed in the selection process only extends to the chosen client's legal personality: that is, endorsement of the client's rights to due process and lawful treatment by law-enforcement authorities, and acknowledgement of the importance of

42 See also W. Bradley Wendel, "Value Pluralism in Legal Ethics," 78 Wash. U. L.Q. 113 (2000) (contending that monism in legal ethics analysis is unwarranted and noting the beneficial nature of pluralism); Robert J. Condlin, "'What's Love Got to Do With It?' - 'It's Not Like They're Your Friends for Christ's Sake': The Complicated Relationship between Lawyer and Client," 82 Neb. L. Rev. 211, 306 (2003) (arguing that it is difficult, if not impossible, to understand lawyer-client relations, in all of their complexity, within the boundaries of a single, all-encompassing, theory).

43 Postema, supra note 5, at 77; Simon, supra note 5, at 42.
aiding all individuals to overcome procedural and bureaucratic obstacles in order to be able to effectively realize their privileges under the law.

Endorsement of the client's moral personality may well exist also, but it cannot be logically deduced from the selection process in any way since the personal spheres of life lie outside the purview of the lawyer's designated role. Both a lawyer who endorses the client's moral personality and a lawyer who resents or is apathetic to the client's moral personality fulfill an identical professional function as role agents; however, while the latter limits his involvement with the client solely to the professional sphere, the former also becomes the client's personal friend (not a legal friend) in a way that is entirely disconnected from his professional role. In other words, in those cases where the choice of clients is also accompanied by the lawyer's endorsement of the client's moral personality, then the lawyer crosses the professional boundary into the personal spheres of life. And though this cross of boundaries does not constitute a breach of the ethical code of conduct, it illuminates the clear-cut separation between the professional and private spheres.

Therefore, according to the macro theory of representation, there is no valid logical basis for criticizing the lawyer due to his choice of clients; rather, public criticism may only be aimed at the person (who so happens to be a legal practitioner) due to his personal choice of friends. And the validity of such criticism is, of course, not derived from the professional sphere but rather solely from the personal and societal ones, since it is in no way different from criticism that any of us may be exposed to from family members or friends who do not approve of our personal choices in life. Drawing such a clear-cut distinction between the lawyer's professional and private capacities ensures a pragmatic public conception of neutrality; and more importantly, it ensures public understanding of the need to demonstrate civic responsibility, tolerance, and restraint similar to those that we have become accustomed to grant one another in everyday life.

**Conclusion**

This essay has sought to advance a consensual moral conception of lawyering as representation of rights and liberties, rather than of people. Forming such a consensual macro conception has vital importance both institutionally and practically.

From an institutional level, it is consonant with all sub-theories because it avoids the futile effort to find one ultimate justification for performing the action of representation, and instead concentrates on developing a basic ethical infrastructure, which directly ensues from the moral essence of the action of representation itself.

From a practical standpoint, this conception guarantees a coherent and clear-cut analytical dichotomy between the lawyer as a professional and the lawyer as a private person, and thus provides a workable ethical framework for resolving the various ethical dilemmas that are constantly entailed in lawyering.

The general starting point in each case is, therefore, the advancement of a neutral conception of the moral essence of lawyering; a conception that acknowledges multicultural diversity and accordingly does not aspire to impose one particular justification for performing the action of representation. It is a conception that allows infusion of individual-tailored justifications, but nonetheless ensures that the incorporation of such justifications will be done thoughtfully and after careful consideration of the lawyer's role.
as a representative of rights and liberties, rather than of people. The advantage of developing a simplified and pragmatic macro theory of lawyering lies in its ability to provide a neutral, fundamental infrastructure upon which each individual will be then able to build his own ideological conception in a thoughtful, calculated, and tolerant manner; rather than as a result of haphazard impulses or ephemeral demagogic trends.

I argue that an important aspect missing from the public discourse on legal ethics nowadays is not profound theories or incisive moral observations; those are found in abundance. Rather, what is missing is a widespread willingness of professionals and laymen alike to be comparatively acquainted with prevalent theories, assimilate their principles, and being able to draw thoughtful insights and conclusions.

A publically accepted macro theory could certainly facilitate the development of an informed discussion, and thus encourage all those who wish to take part in the dialogue to demonstrate civic responsibility and thoughtfully decide whether or not to adopt sub-theories that support criticism of lawyers due to the personal (rather than legal) identity of their chosen clients. The responsibility to act on calculated reason, as is well known, weakens the power of the demagogue and strengthens the communal respect toward the professional choices that each of us makes.
**I. KOLODZIEJ V. MASON, 996 F.SUPP.2D 1237 (M.D. FLORIDA 2014)**

In December 2006, NBC aired an earlier recorded interview with Mason, who was defending accused murderer Nelson Serrano, on their nationally televised "Dateline" program. Mason alleged that his client could not have committed the murders he was accused of (which were in Bartow, Florida), because he was in Atlanta, Georgia at the time. That Serrano was in Atlanta was proven by his appearance on security footage twice, with only a roughly ten hour span where he was unaccounted for. The prosecution disagreed, alleging that it was possible for Serrano to have flown to Florida under several aliases and flown back within the time frame, and in time to make his second appearance on the hotel's security footage.

In the unedited version of his interview with NBC, Mason argued that the prosecution's timeline was absurd, specifically because Serrano would have had to disembark his plane in Atlanta, and make it to the La Quinta Inn he was staying at several miles away, all in less than twenty-eight minutes. After detailing all that would be required for Serrano to have been able to pull off that timeline, and why it was so unlikely, Mason stated, "I challenge anybody to show me, and guess what? Did they bring in any evidence to say that somebody made that route, did so? State's burden of proof. If they can do it, I'll challenge 'em. I'll pay them a million dollars if they can do it."

NBC did not air Mason's original unedited interview during Serrano's trial. After Serrano was found guilty, NBC aired an edited version of Mason's interview, without much of the commentary, including Mason's references to the State's burden of proof. In fact, all that aired of Mason's original interview was: "I challenge anybody to show me – I'll pay them a million dollars if they can do it."

Dustin Kolodziej, then a law student at the South Texas College of Law, had been following the Serrano case. When he saw the edited version of Mason's interview, he understood the challenge as a serious challenge, open to anyone, which is, as he understood it, to "make it off the plane and back to the hotel within [twenty-eight] minutes," as presented by the prosecution's timeline, in exchange for one million dollars.

Kolodziej ordered and studied the transcript of the edited interview, and interpreted it as an offer to form a unilateral contract that he decided to accept by performing the contract. In December 2007, Kolodziej recorded himself retracing Serrano's route, traveling from a flight at the Atlanta airport to what he believed was the location of the now-defunct La Quinta within twenty-eight minutes. Kolodziej then sent Mason a copy of the recording and a letter stating that he had performed the challenge and requesting payment. Mason responded, both refusing payment and denying that the offer was ever serious.
Kolodziej, believing Mason's refusal to pay was a breach of contract, sued Mason and Mason's law firm, J. Cheney Mason, P.A., in the United States District Court for the Southern District of Texas. The court dismissed the case for lack of personal jurisdiction.

However, during those proceedings, Kolodziej discovered the existence of the unedited interview and that Dateline had edited the interview before it aired. Kolodziej subsequently filed suit in the United States District Court for the Northern District of Georgia, which was transferred to the Middle District of Florida.

Mason promptly moved for summary judgment. Summary judgment was granted on two grounds: that Kolodziej was unaware of the unedited interview Mason had given to Dateline at the time he attempted to perform the challenge, and thus that he could not accept an offer that he did not know existed, and second, that the challenge in the unedited interview was unambiguously directed to the prosecution only, and thus was not open to Kolodziej to accept.

The court further noted that "[i]t is basic contract law that one cannot suppose, believe, suspect, imagine or hope that an offer has been made."

Kolodziej appealed to the Eleventh Circuit.

II. KOLODZIEJ V. MASON, 774 F.3D 736 (11TH. CIR. 2014)

The Eleventh Circuit determined the "million-dollar challenge" issued by Mason did not give rise to an enforceable unilateral contract, and thus the district court properly entered summary judgment in Mason's favor.

More specifically, the Eleventh Circuit stated that:

"[w]e do not find that Mason's statements were such that a reasonable, objective person would have understood them to be an invitation to contract, regardless of whether we look to the unedited interview or the edited television broadcast seen by Kolodziej. Neither the contents of Mason's statements, nor the circumstances in which he made them, nor the conduct of the parties reflects the assent necessary to establish an actionable offer – which is, of course, essential to the creation of a contract."

The court also found persuasive that none of Mason's surrounding commentary or actions, either in the unedited original interview, edited broadcast, or subsequent behavior, indicated that offer was a serious one. The statement itself was merely a "rhetorical expression to raise questions as to the prosecution's case," and Mason didn't set aside money in escrow or advertise or include any information to be used to contact him about the challenge.

Further, no material terms were agreed on by the parties. The court stated that "even the proper starting and ending points for Mason's purported challenge were unspecified and definite; Kolodziej had to speculate and decide for himself what constituted the essential terms of the challenge." This included assumptions
about location on the plane Serrano (and later, Kolodziej) was sitting in, and the location of the La Quinta Inn Serrano had been staying in.

The court also found it "troublesome that, in all this time – ordering the transcript, studying it, purchasing tickets, recording himself making the trip – Kolodziej never made any effort to contact Mason to confirm the existence of an offer, to ensure any such offer was still valid after Serrano's conviction, or to address the details and terms of the challenge."

However, the court further determined to "not attribute bad intent when inexperience may suffice. Kolodziej may have learned in his contracts class that acceptance by performance results in an immediate, binding contract and that notice may not be necessary, but he apparently did not consider the absolute necessity of first having a specific, definite offer and the basic requirement of mutual assent."

Thus, summary judgment was procedurally appropriate because there were no genuine issues as to whether the parties' conduct implied a contractual understanding.

III. **KOLODZIEJ V. MASON, 996 F.SUPP.2D 1237 (M.D. FLORIDA 2014) (RENEWED MOTION FOR ATTORNEY’S FEES)**

After the ruling by the Eleventh Circuit to uphold the holding of the United States District Court for the Middle District of Florida, Mason and his law firm, J. Cheney Mason, P.A., have moved for an award of attorney's fees, expenses and costs. Mason alleges that Kolodziej and his counsel had wasted the time of judges and courts, as well as forcing him to hire counsel in three states and incur hundreds of thousands of dollars in legal fees and expenses, and thus should be responsible for reimbursing Mason and his firm.